# United States Department of Labor
# Employees' Compensation Appeals Board

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| **L.S., Appellant** | ) | |
| **and** | ) | **Docket No. 19-1730** |
| | ) | **Issued: August 26, 2020** |
| **SOCIAL SECURITY ADMINISTRATION, PERSONNEL OPERATIONS, Jamaica, NY, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

## ***JURISDICTION***

On August 15, 2019 appellant, through counsel, filed a timely appeal from a March 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the March 1, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[4] The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 14, 2008 appellant, then a 43-year-old benefit authorizer, filed a traumatic injury claim (Form CA1) alleging that on November 6, 2008 she sustained buttocks and low back injuries when she fell backwards over an open file cabinet drawer while in the performance of duty. OWCP accepted the claim for back contusion and buttocks contusion under OWCP File No. xxxxxx972. It paid appellant wage-loss compensation and medical benefits on the supplemental rolls commencing December 22, 2009. Appellant returned to work for six hours a day on May 12, 2010.

On September 24, 2010 appellant bent over to retrieve a pen from under her desk when she experienced a sharp pain in her low back and buttocks, for which she filed a notice of recurrence (Form CA-2a). OWCP treated this incident as a new traumatic injury under OWCP File No. xxxxxx023, and accepted it for thoracic or lumbosacral radiculitis.[5] Appellant stopped work on the date of injury and OWCP paid her wage-loss compensation and medical benefits on the supplemental rolls.

On March 24, 2009 Dr. Rajpaul Singh, a Board-certified neurologist, reported that electromyography (EMG) and nerve conduction velocity (NCV) testing revealed normal findings.

A June 22, 2011 magnetic resonance imaging (MRI) scan of appellant's lumbar spine demonstrated findings of L3-4 disc herniation with thecal sac impression, left subligamentous disc herniation abutting the left S1 nerve root, disc bulge at L4-5, hypertrophy of the facets at L2-3 and L3-4, left lumbar convexity, and straightening of the lumbar lordosis.

A September 8, 2011 EMG study documented evidence of left L3-4 radiculopathy.

On January 28, 2014 appellant filed a claim for a schedule award (Form CA-7).

In support of her schedule award claim, appellant submitted an October 9, 2013 report from Dr. Arthur Becan, a Board-certified orthopedic surgeon. Dr. Becan, utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[6] diagnosed chronic post-traumatic lumbosacral strain and sprain, L3-4 disc herniation (confirmed on MRI scan), L5-S1 disc bulge (confirmed on MRI scan), left L3-4 radiculopathy

[4] Docket No. 13-847 (issued July 23, 2013) (termination decision); Docket No. 16-1789 (issued September 1, 2017).

[5] The two cases were subsequently administratively combined whereby this claim, File No. xxxxxx023, served as the master claim and File No. xxxxxx972 served as the subsidiary claim.

[6] A.M.A., *Guides* (6th ed. 2009).

(confirmed on EMG/NCV studies), and right-sided lumbosacral radiculitis. Based on appellant's moderate L5 motor strength deficit right extensor halluces longus, Dr. Becan calculated 13 percent permanent impairment of the right lower extremity. Referencing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), he calculated an additional six percent permanent impairment of the right lower extremity based on severe sensory deficit right L4 nerve root. Dr. Becan calculated five percent permanent impairment of the left lower extremity for moderate sensory deficit of the left L4 nerve root. He concluded that appellant had reached maximum medical improvement (MMI) on October 9, 2013 and was entitled to a schedule award for a final combined 18 percent permanent impairment of the right lower extremity and 5 percent permanent impairment of the left lower extremity.

On May 13, 2014 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the medical evidence of record and findings of Dr. Becan's October 9, 2013 report. He agreed with Dr. Becan's finding of five percent permanent impairment of the left lower extremity. However, Dr. Magliato disagreed with his 18 percent right lower extremity impairment rating, noting that the medical evidence pointed only to a left-sided radiculitis based on the MRI scans and the last EMG/NCV testing. He further noted that Dr. Singh's June 20, 2012 report concluded that appellant had a left-sided L3-4 radiculopathy and normal findings in the right lower extremity as all decreased sensation was experienced on the left side. However, this was in conflict with Dr. Becan's findings of significant right lower extremity neurological deficits and only very minor left lower extremity neurological deficits. Dr. Magliato recommended that OWCP obtain a supplemental report from Dr. Becan since he could have mixed up the right and left lower extremities, or a referee medical examination "to clear up the conflict" between Dr. Becan and Dr. Singh's examination results.

On December 18, 2014 a January 3, 2014 diagnostic report was received from Dr. Edmond Knopp, a Board-certified diagnostic radiologist, who reported that an MRI scan of the lumbar spine demonstrated L3-4 disc herniation and degenerative disc disease.

In an August 25, 2014 diagnostic report, Dr. Osafradu Opam, a treating neurologist, reported that EMG/NCV testing revealed right L5 and S1 radiculopathy and left S1 radiculopathy.

In a January 19, 2015 supplemental report, Dr. Becan noted his review of Dr. Magliato's report and the August 25, 2014 EMG/NCV testing. He acknowledged the DMA's dispute pertaining to right-sided radicular complaints as Dr. Singh had not found previous right-sided physical examination findings. However, Dr. Becan argued that his examination findings directly correlated with the new EMG/NCV studies. He explained that the new EMG/NCV testing revealed right L5 and S1 radiculopathy in conjunction with his physical examination findings of moderate 3/5 motor strength deficit of the right extensor hallucis longus. Dr. Becan concluded that he stood by his impairment ratings as noted in the October 9, 2013 report.

In a February 27, 2015 report, Dr. Magliato noted his review of Dr. Becan's January 19, 2015 report. He explained that while the August 25, 2014 EMG/NCV testing supported Dr. Becan's October 9, 2013 right lower extremity examination findings, it was still in conflict with Dr. Singh's 2012 normal right lower extremity findings. He further reported that Dr. Becan's October 9, 2013 moderate L4 sensory deficit left lower extremity findings appeared to be too low and did not correlate with the more severe EMG/NCV and MRI scan findings. Given conflicting

opinions, diagnostic testing, and examination findings, Dr. Magliato recommended a referee medical examination.

OWCP declared a conflict in medical opinions between Dr. Magliato, serving as the DMA, and Dr. Becan, appellant's treating physician, as to the extent and degree of appellant's permanent impairment of the lower extremities. It referred appellant to Dr. William B. Head, a Board-certified neurologist, for an impartial medical examination. In an August 18, 2015 report, Dr. Head concluded that appellant had zero percent permanent impairment relative to the September 24, 2010 employment injury.

On September 2, 2015 OWCP requested that a different DMA review Dr. Head's August 18, 2015 referee medical report. On September 28, 2015 Dr. Andrew A. Merola, a Board-certified orthopedic surgeon serving as an DMA for OWCP, confirmed reviewing Dr. Head's report, but failed to provide an independent opinion with respect to permanent impairment of the lower extremities.[7]

By decision dated November 10, 2015, OWCP denied appellant's claim for a schedule award as the evidence was insufficient to establish that she sustained any permanent impairment to a member or function of the body. It based its decision on Dr. Head's August 18, 2015 referee report and Dr. Merola's September 28, 2015 report, serving as the DMA for OWCP.

By decision dated April 28, 2016, OWCP's hearing representative affirmed the November 10, 2015 decision.

On September 7, 2016 appellant, through counsel, filed an appeal with the Board. By decision dated September 1, 2017, the Board set aside OWCP's April 28, 2016 schedule award decision and remanded the case for further development.[8] The Board found that OWCP did not follow its procedures in selecting Dr. Head as the impartial medical examiner and thus remained an unresolved conflict in medical opinion regarding the extent of appellant's lower extremity impairment.

On June 26, 2018 OWCP referred appellant to Dr. Alan Crystal, a Board-certified orthopedic surgeon, for an impartial medical evaluation regarding the extent of permanent impairment to the lower extremities. Dr. Crystal was requested to evaluate appellant's permanent impairment referencing *The Guides Newsletter*.

In his June 26, 2018 report, Dr. Crystal reviewed medical reports and diagnostic studies dating back to appellant's first work-related lumbar injury on November 6, 2008. He provided physical examination findings and diagnosed resolved back contusion, resolved buttock contusion, resolved lumbar sprain, and lumbar radiculitis with residual mild sensory deficit of left L4 and left S1 dermatome, without motor or reflex abnormalities. Dr. Crystal determined that appellant reached MMI on August 6, 2013 and had no ratable impairment to the lower extremities. Dr. Crystal utilized appellant's September 8, 2011 EMG study to calculate appellant's lower

[7] When responding to OWCP's request regarding whether Dr. Head correctly calculated the impairment rating in his August 18, 2015 referee medical report, Dr. Merola stated, "With respect to impairment rating Dr. Head opines, 'I fail to find objective clinical basis of any (zero percent permanent neurological condition or disability in this case.)'"

[8] *Supra* note 3.

extremity impairment rating. While appellant's June, 22, 2011 lumbar MRI scan documented disc herniation at L3-4 and the September 8, 2011 EMG study provided findings of left L3-4 radiculopathy, he related that there was no clinical correlation to establish the results and diagnoses. Dr. Crystal further reported that the August 25, 2014 EMG study which revealed right L5 and S1 radiculopathy and left S1 radiculopathy could not be used in his assessment since, unlike the September 8, 2011 he used, it was not taken immediately after the occurrence of appellant's injury. As such, he assigned a grade modifier of zero clinical studies. With respect to physical examination findings, Dr. Crystal indicated "minimal effort" and "faked strength" with regard to appellant's evaluation. He argued that the results of the physical examination were not a reliable indicator of appellant's impairment since testing involved subjective cooperation. Dr. Crystal reported that appellant's reflexes were intact, findings which were consistent with earlier medical examinations like those from Dr. Singh. He asserted that only Dr. Becan and Dr. Head could not elicit ankle jerks in their examinations when all prior reports documented intact reflexes. Dr. Crystal determined that the clinical examination showed normal S1 motor and S1 reflect, finding only a subjective complaint of decreased sensation in the left S1 dermatome which he considered mild. He explained that because appellant's radiating pain did not go beyond the level of the knee, it was not consistent with lumbar radiculopathy. Rather, the pain which radiated to appellant's groin, buttocks, and upper thighs was consistent with axial pain caused by degenerative discs and facet joint arthritis. Therefore, Dr. Crystal assigned a grade modifier of zero for functional history. He found objective findings for lumbar radiculitis with residual mild sensory deficit of the left L4 and left S1 dermatome, without motor or reflex abnormalities. Dr. Crystal asserted that appellant had degenerative discs which continued to degenerate, thereby explaining problems at different nerve root levels. He disagreed with Dr. Becan's impairment rating and determined that appellant had zero percent permanent impairment of the right and left lower extremities. Dr. Crystal related that appellant's class of diagnosis (CDX) was 1, grade modifier functional history (GMFH) was 0, grade modifier physical examination (GMPE) was 1, grade modifier clinical studies (GMCS) was 0, therefore the net adjustment was -2 and resulted in a grade A, 0 percent impairment rating, pursuant to *The Guides Newsletter* grid for rating the spinal nerves at the L4 and S1 levels. Dr. Crystal concluded that appellant reached MMI on August 6, 2013, the date of Dr. Singh's last examination.

By decision dated August 2, 2018, OWCP denied appellant's schedule award claim finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. The special weight of the medical evidence was given to Dr. Crystal's June 26, 2018 report serving as the referee physician.

On August 7, 2018 appellant, through counsel, requested an oral hearing before OWCP's hearing representative.

A hearing was held on December 18, 2018. Counsel for appellant argued that Dr. Crystal failed to acknowledge aggravation as an accepted form of causation. He explained that degenerative conditions affecting a scheduled member must be rated. Counsel further argued that Dr. Crystal rejected the June 22, 2011 lumbar MRI scan that demonstrated left-sided L5-S1 disc herniation because those findings reflected a degenerative process. Counsel noted that appellant's impairment rating should be evaluated based on findings at the time of the impairment examination, which Dr. Crystal failed to do. He indicated that even Dr. Magliato, serving as the DMA who was on one side of the conflict, utilized the most recent EMG at the time of his February 27, 2015 evaluation to calculate appellant's impairment rating. The more recent August 25, 2014 EMG study confirmed left sided S1 radiculopathy and coincided with earlier MRI

scan studies that showed disc herniation at L5 to S1 on the left. Counsel opined that Dr. Crystal's opinion was not entitled to the special weight of medical evidence.

Following the hearing, appellant submitted a December 12, 2018 addendum report from Dr. Becan who reviewed Dr. Crystal's June 26, 2018 referee report and disagreed with his impairment evaluation. Dr. Becan provided additional support for his own impairment evaluation, reporting that appellant sustained 18 percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity in accordance with his October 9, 2013 examination findings.

In support of her claim, appellant also submitted a December 19, 2018 report from Dr. Vikas Varma, a Board-certified orthopedic surgeon, who diagnosed low back pain, lumbar disc disease, and lumbar radiculopathy, predominantly in left L3-4 and L4-5 distribution as a result of the September 24, 2010 work-related injury. Dr. Vikas requested authorization for an EMG/NCV study and MRI scan of the lumbar spine due to medical necessity as it related to appellant's work-related injury. OWCP approved authorization for additional diagnostic testing and treatment.

In a January 21, 2019 EMG/NCV study, Dr. Varma documented findings related to the lower extremities and diagnosed chronic bilateral L5-S1 radiculopathy. A February 8, 2019 lumbar MRI scan report was also submitted.

By decision dated March 1, 2019, OWCP's hearing representative affirmed the August 2, 2018 decision finding that the special weight of the medical evidence remained with Dr. Crystal who found no permanent impairment of the left or right lower extremities.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body.[9] However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[10]

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[11] The Board has approved the use by OWCP of the A.M.A., *Guides*

[9] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[10] 20 C.F.R. § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[12]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[13] Furthermore, the back is specifically excluded from the definition of organ under FECA.[14] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.[15] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.[16] The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[17]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[18] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[19] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[20]

## ***ANALYSIS***

The Board finds that this case is not in posture for decision.

In his June 26, 2018 report, Dr. Crystal, serving as the referee physician, found zero percent permanent impairment of appellant's left and right lower extremities. He found objective findings for lumbar radiculitis with residual mild sensory deficit of the left L4 and left S1 dermatome, without motor or reflex abnormalities. Dr. Crystal asserted that appellant had degenerative discs which continued to degenerate, thereby explaining problems at different nerve root levels.

[12] *Isidoro Rivera*, 12 ECAB 348 (1961).

[13] *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[14] *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[15] *V.J.*, Docket No. 19-1789 (issued April 8, 2020).

[16] *Supra* note 11 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[17] *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[18] 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[19] *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

[20] *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

Dr. Crystal also noted that the September 8, 2011 EMG established normal findings since there was no clinical correlation to verify the results of the left L3-4 lumbar radiculopathy documented in the study. He explained that due to lack of physical findings, subjective complaints, and a normal EMG, appellant did not possess a permanent impairment of a scheduled member of the lower extremities.

Having reviewed the case record, the Board finds that this case must be remanded to OWCP as there remains an unresolved conflict in the medical evidence regarding permanent impairment of the right and left lower extremity.[21] Appellant's September 8, 2011 EMG study revealed left L3-4 radiculopathy and her August 25, 2014 EMG study revealed right L5 and S1 radiculopathy and left S1 radiculopathy. Dr. Crystal failed to provide rationale as to why the September 8, 2011 EMG study was the only study that could be utilized in the impairment rating other than it was performed soon after the injury.

OWCP also failed to properly develop the evidence following Dr. Crystal's June 26, 2018 report. It thereafter received a January 21, 2019 EMG/NCV study establishing chronic bilateral L5-S1 radiculopathy and a February 8, 2019 lumbar spine MRI study in support of her claim prior to the March 1, 2019 decision. OWCP, however, failed to forward these relevant reports of record to Dr. Crystal for comment and review pertaining to the extent of permanent impairment of appellant's left and right lower extremity rating.[22] The record reflects that Dr. Crystal's impairment rating was therefore not based on a full and accurate framework rendering his opinion of limited probative value.[23]

The Board further notes that once OWCP begins to develop the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[24]

Therefore, the Board will remand the case to OWCP for further medical development.[25] OWCP shall request that Dr. Crystal review the entire case record and provide a permanent impairment rating based upon the current evidence of record. If Dr. Crystal is unable or unwilling to provide a supplemental report, OWCP shall refer appellant and the case file to another impartial medical examiner to properly determine the extent of permanent impairment of the right and left lower extremities based on a current examination, the accepted employment injuries, and use of the proper tables and figures of *The Guides Newsletter*.[26] After such further development as OWCP deems necessary, it shall issue *a de novo* decision.

## ***CONCLUSION***

The Board finds that this case is not in posture for a decision.

[21] *M.K.*, Docket No. 18-1614 (issued March 25, 2019).

[22] *D.S.*, Docket No. 19-0025 (issued September 3, 2019)

[23] *F.R.*, Docket No. 17-1711 (issued September 6, 2018); *L.J.*, Docket No. 14-1682 (issued December 11, 2015).

[24] *T.C.*, Docket No. 17-1906 (issued January 10, 2018); *Richard F. Williams*, 55 ECAB 343 (2004).

[25] *P.E.*, Docket No. 17-0961 (issued March 14, 2018).

[26] *G.W.*, Docket No. 17-0957 (issued June 19, 2017).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 1, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: August 26, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board